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U.S. Citizenship and Immigration Services

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[redacted]

AUG 15 2007

FILE: LIN 06 024 53332 Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Laura Deadrick

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability or a member of the professions holding an advanced degree. The petitioner seeks employment as a research fellow. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel submits a brief and additional evidence. At the outset, counsel asserts that the adjudication by the same adjudications officer of two petitions filed by this petitioner constitutes a violation of due process that alone justifies the appeal. Counsel provides no legal authority or policy, and we know of none, that would preclude a single adjudications officer from reviewing different petitions filed on behalf of the same individual. It could be credibly argued that review by a single adjudicator insures consistency, improves efficiency and prevents contradictory claims from being advanced in separate proceedings involving the same individual. We note that current procedures do allow for a second review through the appeals process. Thus, we find that counsel's due process concern is without merit.

In general, counsel asserts that the director requested specific evidence and then denied the petition based on the lack of different evidence never requested. Counsel states that the amount of time in which to file an appeal is too short to submit some of the evidence found lacking in the director's final decision. Counsel did not, however, request additional time to supplement the appeal pursuant to 8 C.F.R. § 103.3(a)(2)(vii). For the reasons discussed below, we find that the director's concerns in the final decision are, for the most part, consistent with the evidence requested in the request for additional evidence. Ultimately, while the director rejected the petitioner's work in China for the wrong reasons (its publication in Chinese) we concur with the director that the petitioner has not demonstrated that his current research, wholly unrelated to his previous work, has sufficiently influenced the field.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare

> of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
>
> (B) Waiver of Job Offer.
>
> > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner holds a Ph.D. in Automatic Control from the Harbin Institute of Technology in China. This degree was evaluated as equivalent to a U.S. Doctor of Engineering, specializing in Electromechanical Engineering. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national

interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The director did not contest that the petitioner works in an area of intrinsic merit, weather radar systems, or that the proposed benefits of his work, improving the accuracy of rain estimation, would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

Initially, the petitioner submitted (1) several reference letters, (2) his articles and conference presentations, (3) his academic credentials, (4) government recognition of his work in China, (5) his professional memberships, (6) evidence that the petitioner reviewed a manuscript for publication, (7) evidence that the petitioner and his supervisor have cited two of the petitioner's articles, (8) electronic communications between the petitioner and other scientists, (9) Chinese patents and (1) the petitioner's current project report listing the petitioner as a "Post Doc."

On December 28, 2005, the director issued a request for additional evidence. Much of the first page is devoted to requesting basic evidence, such as education, the rankings of the journals carrying the petitioner's articles and documentation of his patents. Item 6 requests copies of no more than three articles that cite the petitioner's work. On page two, however, Example 4 specifically suggests the submission of "evidence showing a citation for the article," and Example 5, relating to the petitioner's patents, suggests the submission of "copies of documentation showing production/implementation of the invention."

The chart summarizing the petitioner's response is organized around the six items with no reference to the director's five examples. The petitioner submitted the basic evidence requested regarding his education and the foreign patents and the translations of these documents. The petitioner also submitted materials ranking the journals carrying some of his articles. Finally, the petitioner submitted an article by the petitioner's supervisor citing an article the petitioner and his supervisor coauthored.

On pages three and four of the final decision the director listed all of the evidence submitted. The director then spent three paragraphs discussing the petitioner's publication record, noting the lack of evidence regarding the publication and date of publication for some articles and ultimately concluding that the petitioner had not demonstrated the influence of his individual articles. The director then concluded that the petitioner had not demonstrated that his professional memberships set him apart from his peers. Next, the director acknowledged the submission of letters, including letters from individuals who had met the petitioner at conferences, but concluded that the letters could not establish eligibility without supporting objective evidence. Finally, the director concluded that the petitioner had not demonstrated the impact of his patented innovations.

On appeal, counsel correctly notes that the director did not previously request more information about the publication and dates of publication for the petitioner's articles. Counsel further notes that some of the petitioner's Chinese articles were in English or had English abstracts. We withdraw any implication that articles in reputable Chinese journals are presumed less influential because only those fluent in Chinese can read the articles. We note that there are more than 1.3 billion people living in China.

Counsel, however, incorrectly states that the director did not request evidence of citations beyond copies of no more than three articles citing the petitioner's work. Counsel asserts that it is now impossible to retrieve a list of citations for the Chinese-language articles within the time frame to appeal. As noted above, however, counsel does not request additional time to supplement the appeal. As also noted above, Example 4 clearly suggests that evidence of the impact of a given article would include evidence that the article had been cited. Moreover, counsel appears to have been aware that citations are useful evidence of an article's impact in the field as counsel submitted evidence of self-cites for the petitioner's recent work with the initial submission.

Finally, counsel asserts that the director never asked for evidence that the petitioner's patented innovations had impacted the field. The petitioner now submits a letter on [redacted] Co., Ltd. letterhead, signature illegible, indicating that the company has incorporated the petitioner's five patents into its steel bundler products. As stated above, Example 5 of the request for additional evidence specifically requested evidence of the impact of the petitioner's patented innovations. Thus, the director did not raise a new concern in the final denial regarding the impact of the petitioner's patents.

Regardless, the petitioner now works in the field of geoscience and the sole basis of the petition is that the petitioner will improve the accuracy of rain estimation algorithms. The petitioner's Chinese patents involve a twisting device for a rebar binding robot, a positioning device for a rebar binding robot, a reserving device for a rebar binding robot, a multipurpose horizontal drill machine and an artillery shaped drill head. The petitioner has not explained how any of these innovations, or his articles published in China during the same time, have any relation to his current work on rain estimation algorithms or geoscience in general. We acknowledge that [redacted], a professor at the [redacted], asserts that the petitioner used various sensors and complicated control algorithms in his robotics and tool work. None of the references, however, explain the relationship between any algorithms the petitioner may have used in his robotics and tool research and his current research into geoscience algorithms.

We recognize that the director did not question whether the petitioner's work in China relates to his current work. Nevertheless, we note that an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also*

Dor v. INS, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). Moreover, our concern that the petitioner's previous work does not relate to his current work is primarily based on evidence submitted for the first time on appeal, reflecting that the petitioner's previous work is being applied on steel bundler products. As it was submitted for the first time on appeal, it was not before the director when he issued his decision.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

At issue is whether this petitioner's contributions in the field of rain estimation algorithms are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

The petitioner joined the research laboratory of [redacted] at Colorado State University (CSU) in 2000 and remained there as of the date of filing. For the reasons discussed above, it is this work and this work only that is relevant to the petitioner's track record of success with rain estimation algorithms. [redacted] is the co-principal investigator of the CSU-CHILL radar facility, a polarimetric Doppler radar operated by CSU in cooperation with the National Science Foundation (NSF). [redacted] is also the co-principal investigator and deputy director of the NSF Engineering Research Center, the Center for the Collaborative Adaptive Sensing of the Atmosphere (CASA). The national programs conducted by [redacted] include the Advanced Communication Technology Satellite (ACTS) and the National Aeronautics and Space Administration's (NASA) Tropical Rainfall Measuring Mission (TRMM).

The petitioner submitted several letters discussing his work with [redacted]. Citizenship and Immigration Services (CIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm. 1988). However, CIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796. CIS may even give less weight to an opinion

that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In evaluating the reference letters, we note that letters containing mere assertions of potential applications and positive response in the field are less persuasive than letters that provide specific examples of how the petitioner has influenced the field. In addition, letters from independent references who were previously aware of the petitioner through his reputation and who have applied his work are the strongest letters, especially when supported by more objective evidence of the petitioner's influence.

[redacted] explains that his laboratory initiated a neural networks technique for rainfall estimation and that the petitioner has been working with this technique. [redacted] asserts that the petitioner is an expert in TRMM data processing and implementation, having coauthored an article on raindrop size distribution from TRMM precipitation radar (PR) and ground-based radars. This research advances global observation of tropical rain and provides a new method to validate the quality of TRMM PR measurements of the tropical rain from space. Specifically, the petitioner's algorithm "could be used in the development of instruments onboard the satellite in a future mission, like the Global Precipitation Mission (GPM) being planned by NASA."

[redacted], a project scientist with the Earth Observing Laboratory (EOL) in Colorado and a CSU collaborator, and other references reiterate this claim. [redacted], a research scientist at a leading research institute in Japan,[1] asserts only that this work on raindrop size is "potentially useful for developing radiometer based precipitation retrieval algorithms in the GMS mission in the future." The record, however, lacks letters from a high level (or any level) official at NASA confirming their interest in the petitioner's algorithm for GPM. [redacted]t further speculates that the petitioner's algorithm "could be integrated into the next generation" of Next-generation Radar (NEXRAD) radars. Once again, the record lacks evidence that any steps have been taken towards such integration.

The petitioner also participated in research at CASA, providing key information to the system design of the attenuation statistics for X-band radar. According to [redacted], this work had been presented at a conference as of the date of filing. [redacted] notes that a CASA test bed radar network, the Distributed Collaborative Atmosphere Sensing System (DCAS), is to be deployed in Houston, Texas, and asserts that accurate precipitation predictions at this site could save millions of dollars. [redacted] an associate professor at the University of Oklahoma also asserts that the petitioner's work on X-band radar is relevant to DCAS. The references, however, do not indicate that CASA has agreed to adopt the petitioner's techniques in developing DCAS or that it is considering doing so.

[1] According to [redacted] a research scientist associated with the National Research Council in Rome, TRMM is a joint space project between the United States and Japan.

Finally, [redacted] discusses the petitioner's proposal of a new method that aims to more accurately determine the differences in the reflectivity measurements between TRMM PR and ground validation radars. While this technique was evaluated at an active radar site and "can be used to calibrate the ground radars," it had yet to be presented or published as of the date of filing. Thus, it could not have influenced the field as of that date and cannot be considered. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

[redacted] another professor at CSU, reiterates much of the information provided by Dr. [redacted] and other references note that the petitioner's work is supported by government agencies and that the petitioner has 10 years of experience. It can be argued, however, that most, if not all, research is funded and that in order to receive funding, the research must present some benefit to the general pool of scientific knowledge. It does not follow that every researcher working with a government grant inherently serves the national interest to an extent that justifies a waiver of the job offer requirement. Moreover, the petitioner only had less than five years of experience in geoscience as of the date of filing. His prior experience appears unrelated to his current work. Regardless, the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(B) indicates that ten years of progressive experience is one possible criterion that may be used to establish exceptional ability. Because exceptional ability, by itself, does not justify a waiver of the job offer/alien employment certification requirement, arguments hinging on experience, while relevant, are not dispositive to the matter at hand. *Matter of New York State Dep't of Transp.,* 22 I&N Dec. at 222.

The strongest letter is from [redacted] a professor at Texas A&M University. [redacted] indicates that he met the petitioner at a 2004 conference where the petitioner presented "cutting-edge" research on raindrop size and that he met with the petitioner during a recent trip to CSU. Dr. [redacted] asserts: "I am personally using [the petitioner's] results in my research on estimating the errors in oceanic rainfall retrievals." The record also contains e-mail messages between the petitioner and [redacted] preparing for [redacted] visit to CSU. The petitioner's research is no doubt of value. It can be argued, however, that any research must be shown to be original and present some benefit if it is to receive funding and attention from the scientific community. Any postdoctoral research, in order to be accepted for publication or funding, must offer new and useful information to the pool of knowledge. It does not follow that every researcher who performs original research that adds to the general pool of knowledge inherently serves the national interest to an extent that justifies a waiver of the job offer requirement. While [redacted] asserts that the petitioner's work is helpful in understanding the characteristics of rainfall distribution, he concludes that it is only "potentially useful for developing radiometer based precipitation retrieval algorithms for the future GPM mission."

To document the petitioner's publication record, he submitted a list of publications, the first pages of several manuscripts and an Internet listing of publications. The petitioner's self-serving list of publications is not evidence. Specifically, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici,*

22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg. Comm. 1972)). Moreover, some of the manuscripts bear no indicia of publication such as a journal name, acceptance date or pagination. Thus, these manuscripts are not evidence of publication.

Considering the Internet listing and the publications that do bear indicia of publication, we can determine that, as of the date of filing, the petitioner had presented his work on rainfall estimation at three International Geoscience and Remote Sensing Symposium (IGARSS) conferences. This work was also published in the bound proceedings of these conferences. In addition, the petitioner submitted two copies of his article published in *IEEE Transactions on Geoscience and Remote Sensing*. The also petitioner submitted two manuscripts purportedly from American Meteorology Society (AMS) conferences but the record lacks the proceedings or programs from these conferences confirming the petitioner's participation. Two manuscripts submitted, "Attenuation Statistics for X Band Radar Design" and "Considerations for Comparing Volumetric Reflectivity Observation Between Space-Borne and Ground-Based Radars" are not included on the petitioner's list of publications or the Internet printout and bear no indicia of publication. [redacted] asserts that the petitioner's work on attenuation statistics was presented at a conference.

We will not presume the influence of an article from the fact that it was published or even from the prestige of the journal in which it appears. Rather, it is the petitioner's burden to demonstrate the influence of a given article. The petitioner submits some e-mail correspondence, some of which is with another scientist at CSU, discussing data and requesting copies of the petitioner's papers. While this correspondence suggests an interest in the petitioner's work, it does not reflect that the petitioner's work had already been applied as of the date of filing. The petitioner has never demonstrated that his work has generated any independent citations. On appeal, [redacted] asserts:

> The research establishment may need time to understand the observations revealed in [the petitioner's] paper. However, the published work has attracted attention from researchers all over the world. We've started to provide technical support to researchers in NASA and to Universities where scientists are doing similar research. I know that several research works citing [the petitioner's] co-authored paper will presented at the next International Geoscience and Remote Sensing Symposium (IGARSS).

At best, [redacted] appellate letter suggests that the petition was filed prematurely, before the impact of the petitioner's work could be gauged.

The record contains little in the way of specific evidence to show what major improvements the petitioner had wrought in his current field of endeavor, geoscience, as of the date of filing. While the petitioner has published useful research, it can be argued that the petitioner's field, like most science, is research-driven, and there would be little point in publishing research which did not add to the general pool of knowledge in the field. The record lacks evidence of wide citation of the petitioner's

work or planned implementation of the petitioner's algorithms on major radar or space projects by CASA or NASA.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.